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Supreme Court, U.S.
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No. 09-1532

IN THE
SUPREME COURT OF THE UNITED STATES

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CHARLES CLAYTON,
United States Army, *Petitioner*,
v.
UNITED STATES OF AMERICA,
*Respondent*.

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**On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces**

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# REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF

The Government asserts in its brief in opposition that "given the ease with which laptop computers can be transported from work to home and the ease with which computer files and digital media can be replicated on portable devices, it was reasonable to infer that petitioner had child pornography in his quarters, even if he initially accessed the material from another location." (Opp'n at 9.) This is the crux of the issue in this case. While the Government's assertion is an accurate reflection of the lower court's opinion, it constitutes a dispositive concession because no legal precedent supports the notion that probable cause to search exists absent a nexus between the evidence sought and the place to be searched. On the contrary, that assertion contravenes this Court's prior precedent.

This case merits review because such a broad and expansive view of the Fourth Amendment's proscription against unreasonable searches and seizures establishes a dangerous precedent. If an individual merely subscribes to an Internet group and that group is alleged to have an illegal purpose, the government has probable cause to obtain a warrant to search the subscriber's home even when there is no particularized evidence that the subscriber visited the Internet group after subscribing or participating in the group's functions in any manner. Such an expansive view of the Fourth Amendment abrogates the very "common-sense evaluation" upon which the Government relies.

(Opp'n at 7) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Where there is no actual nexus between the evidence sought and the place to be searched, probable cause does not exist.

It is impossible to reconcile SA McClain's search of petitioner's quarters with the Fourth Amendment. No child pornography had been discovered before SA McClain searched petitioner's quarters. Until she searched petitioner's quarters, all SA McClain had before her was her awareness that the moderator and media manager of the Group had been arrested and confessed to possessing a quantity of child pornography, her awareness that petitioner had requested a Digest from the Group, her awareness, based on her previous experience that suspects who collect child pornography usually store the images on various media devices, information regarding how SSA Watson discovered the Group, and SSA Watson's ICE Report. Notably, SSA Watson's ICE Report admitted that he found no criminal conduct by petitioner. His investigation showed only that, at some unknown time, petitioner registered for membership with the Group. The affidavit also failed to provide any information that petitioner had downloaded any child pornography from the Group or that he participated in any discussions, chats, or other activities as a Group member, save for his request to receive a digest. SA McClain had no evidence indicating that petitioner received any digests or that if he did, the digests contained child pornography.

Subscription to the digest alone, without receiving any alleged child pornography, is constitutionally protected. Images not containing a lascivious exhibition are constitutionally protected speech. See, generally, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter."); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (there are "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed."). There is absolutely no evidence appellant received any child pornography, and no evidence the Digest contained child pornography. As such, his conduct was constitutionally protected.

The Government relies heavily on petitioner's request to receive a Digest from the Group to support its contention that the military magistrate had a substantial basis for finding probable cause. (Opp'n at 2-3, 4, 8, 10, 12.) The Government cites *United States v. Terry*, 522 F.3d 645, 649 (6th Cir. 2008) for the proposition that courts have "universally found" that the probable cause threshold is satisfied if "defendants had purchased access to child pornography on websites." This proposition is inapposite to petitioner's case, because he did not purchase access to child pornography; rather, he signed up to receive a daily Digest and did not pay for the subscription. There is no evidence that petitioner received any Digests, or that, if he did, he

looked at any of the emails or their attachments or saved any of the emails or attachments to his personal computer. Thus, if courts have "universally found" probable cause where defendants have purchased access to child pornography, petitioner's case does not square with the Government's proposition. Put simply, the Government seeks to put a square peg in a round hole.

Petitioner's subscription to an Internet group that advertises child pornography, without more, is insufficient to support probable cause to search a suspect's residence. Should this Court affirm the decision of the intermediate appellate court, the soldiers, sailors, airmen, and marines who have sworn to uphold and defend the Constitution may be subjected to searches and seizures based solely on association or membership without any evidence that a crime has been committed.

## CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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